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David R. Williams dba Industrial Communications v. Hyrum Gibbons & Sons Co. et al : Brief of Appellant

Utah Supreme Court

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Watkis & Faber; Attorneys for Plaintiff-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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DAVID R. WILLIAMS, dba INDUSTRIAL COMMUNICATIONS,	:	
Plaintiff-Appellant,	:	
vs.	:	Supreme Court No. 16,024
HYRUM GIBBONS & SONS CO., a Utah corporation,	:	
Defendant-Respondent,	:	
and	:	
NORTH UTAH COMMUNITY T.V., a Utah corporation,	:	
Intervenor-Respondent.	:	

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BRIEF OF APPELLANT

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An Appeal from the Judgment of the First Judicial District Court in and for the County of Cache, Utah

Honorable VeNoy Christoffersen

****

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NATURE OF THE CASE

This is an action to condemn one-tenth of an acre of unimproved real property in the Logan foothills for use as a radio-telephone transmitting and receiving base station to provide mobile telephone and paging service to the general public in the Logan area.

DISPOSITION IN THE LOWER COURT

The lower court held that appellant had the statutory power of eminent domain, but denied

appellant's right to have the particular site condemned for the reason that there might be some radio wave interference from appellant's equipment if it were improperly tuned on some occasions.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant requests this Court to reverse the trial court and hold that Plaintiff is entitled to have the site selected herein comdemned and that technical matters of radio wave consideration be deferred to the Federal Communications Commission.

STATEMENT OF FACTS

The facts are set forth in numbered paragraphs to aid in referencing.

1. Appellant, a Utah public utility, furnishes radio-telephone service to the general public in eleven Utah counties, and has furnished such radio common carrier regular and emergency services in Utah since 1965. (Plaintiff's Exhibit 3; Tr. pp. 7, lines 15-16, 23-24; 9, lines 11-25; 10, lines 1-9; 22, lines 2-10; 54, lines 16-25; 55, lines 1-22; 95, lines 4-23.)

2. Appellant's radio-telephone channels and equipment operation are authorized and regulated by the Federal Communications Commission, and appellant's service is regulated by the Utah Public Service

Commission. (Plaintiff's Ex. 2, 3; Transcript, pp. 9, lines 11-22; 20, lines 14-25; 21, lines 1-23.)

3. In 1975 the Utah Public Service Commission authorized appellant to furnish radio common carrier telephone service in the Logan, Utah, area because of public need there. (Plaintiff's Ex. 2.)

4. To provide "reasonable, adequate, efficient and continuous service" in the Logan area, as required by the Certificate of Convenience and Necessity order, appellant must obtain an appropriate site, one-tenth acre in size on which to locate a radio-telephone base station and antenna that interconnects with the Bell system. The site must be at an adequate elevation and in close proximity to the service area for the authorized low wattage radio signals to penetrate the major buildings in the service area, such as the Logan Hospital where physicians will receive emergency and business radio communications. (Plaintiff's Ex. 2; Transcript pp. 11-17; 31; 201, lines 6-25.)

5. In selecting the Logan base station and antenna site, appellant's engineers studied extensively the terrain and topography of the Logan area, calculating distances and elevations, physically inspecting possible sites and examining existing

structures in the service area. They tested structures in other service areas similar to the Logan structures for signal penetration, using the same equipment to be installed and operated in Logan. (Transcript pp. 17, lines 2-10; 24, lines 14-25; 25-26; 27, lines 1-11; 28, lines 22-25; 33; 34, lines 1-5; 49; 93, lines 13-25; 94-95; 110; 111, lines 14-25; 112-113; 126, lines 3-25; 127; 128, lines 1-8; 129-140; 146-148.) They also tested signal compatibility and possible interference for all other radio and television systems in Logan with similar signals in other service areas. (Transcript, pp. 18-20; 97; 101; 206, lines 2-25; 351, lines 4-10.) Appellant made an economic feasibility study of the Logan service area in making a site selection. (Transcript, pp. 22; 24; 32; 41; 108.)

6. After making and repeatedly checking the testing and analysis described above over a period of several months, appellant was able to select only one site which could meet the coverage and penetration requirements for adequate service to the Logan area, which is the site in dispute herein. (Transcript, pp. 32, lines 4-6; 35, lines 2-6; 43, lines 10-18; 44, lines 1-7; 46, lines 9-19; 50, lines 9-25; 51-54;

63, lines 1-17; 99, lines 13-16; 110-111; 146, line 3; 153, lines 3-8; 207, lines 2-15; 354, lines 1-11.) The site is vacant property and is adjacent to existing antennas and power poles larger than the one proposed by appellant, and is accessible to necessary electric power, telephone lines, and is on an existing road. (Plaintiff's Exhibits 9, 10; Transcript pp. 183, 10-14; 207, lines 8-15; Defendants' Exhibit 1.)

7. After the completion of evaluation and testing, appellant contacted respondent Gibbons, the owner of the site, and intervenor Community TV, who owns the adjacent antenna site. Intervenor initially had no objections to the proposed use of the site by appellant, and appellant began negotiations to purchase the same from Respondent. (Transcript, pp. 35, lines 7-25; 36; 37, lines 1-15; 38, lines 20-25; 39; 40, lines 1-6; 98, lines 12-25; 99, lines 1-12.) Respondent thereafter declined to sell the property because appellant and respondent could not agree on the value, and appellant began condemnation proceedings.

8. After the action was commenced, intervenor changed its position and was allowed to be a party, and objected to the condemnation. (Record, p. 59.)

9. The trial court determined that appellant

had the statutory power of eminent domain (Record, pp. 38-40, 57-58, 129.), but denied appellant's right to have the particular site condemned for the reason that there might be some radio wave interference from appellant's equipment if the same were improperly tuned on some occasions. All other conditions for condemnation had been met. (Record, pp. 128-133.)

ARGUMENT

POINT I. THE LOWER COURT RIGHTLY DETERMINED THAT APPELLANT AS A PUBLIC UTILITY HAD THE RIGHT TO EXERCISE EMINENT DOMAIN BUT WRONGLY DENIED APPELLANT'S RIGHT TO OBTAIN CONDEMNATION OF THE PARTICULAR SITE.

The concept of wireless telephone companies has been recognized for some time by Utah statutes. Nonetheless, it may be helpful to review the background legal provisions.

Appellant is a public utility and has acted in this matter pursuant to a Certificate of Convenience and Necessity granted by the Utah Public Service Commission. The telephone services provided by appellant, and to be installed in the Logan City area, are subject to both the Utah Public Service Commission and the Federal Communications Commission, as indicated by a prior decision in this Court. Williams v. Public Service Commission of Utah, 29 Utah 2d 9 (1972). As such, appellant is required to provide the best possible service to the public in the most economical and efficient manner. Id.

The Legislature has defined those activities which are public utilities and subject to the Utah Public Service Commission in § 54-4-25, Utah Code Ann. (1953), among which is "telephone corporation." "Telephone corporation" is defined in § 54-2-1(22), Utah Code Ann. (1953), as " . . . every corporation and person, . . . owning, controlling, operating or maintaining any telephone line for public service within this state." (Emphasis added.)

A telephone line is defined in § 54-2-1(21) as:

> . . . all conduits, ducts, poles, wires, cable, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires. (Emphasis added.)

The authority of the Public Service Commission and the definition of "public utility" is in § 54-2-1(29):

> The term "public utility" includes every . . . telephone corporation, . . . where the service is performed for . . . the public generally . . . And whenever any . . . telephone corporation . . . performs a service for . . . the public, . . . for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title. . . .

This Court has defined the test for public utility, in Medic-Call, Inc. v. Public Service Commission, 24 Utah 2d 273 (1970), citing 73 C.J.S., Public Utilities, § 7b, as follows:

> Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select the persons for whom it will perform its service or furnish its commodity, or refuse to one a favor or privilege which it has extended to another, since the term "public utility" precludes the idea of service which is private in its nature and is not to be obtained by the public. . . .

Accord, Holmgren v. Utah-Idaho Sugar Co., 25 U.2d [illegible] (1978).

The Certificate of Convenience and Necessity issued to appellant herein (Record, pp. 4-6) authorizes appellant to "acquire, maintain and operate facilities for a radio-telephone and paging common carrier public utility and to engage in the business of a common carrier." The order further states that such service shall be "between fixed control and base stations subject to the license requirements of the Federal Communications Commission." (Record, p. 6.) In addition, appellant is required to file his tariff of rates similar to the tariff in effect for the Salt Lake City, Provo, and Ogden areas, and appellant is required to "at all times render reasonable, adequate, efficient and continuous service in accordance with the certificate hereby issued . . ." (Record, p. 6.)

In order to provide mobile telephone and paging service, appellant must locate and obtain a suitable site for a base station, which consists of a paging transmitter and mobile telephone transmitter and receiver, and an antenna. The equipment to be installed in Logan is a duplicate of equipment operating at eleven other base stations along the Wasatch Front and in eastern Utah, near Vernal.

(Transcript p. 13, lines 7-11.) The proposed frequencies for Logan would be the same used in the other service areas, expanding the service coverage for all other areas to include the Logan area, so that a Logan physician would receive a page signal while attending a function at the University Medical Center in Salt Lake City from a local telephone call in Logan, or an Ogden contractor would receive telephone calls to his mobile telephone at a job site in the Logan area. (Transcript, p. 13, lines 12-13; 357, lines 7-25; 358, lines 1-17.)

Without the base station site and equipment, appellant would be unable to offer his service to the public in the Cache Valley area, and it is appellant's opinion that there is not an economically feasible alternative site in Logan, other than the site sought herein, and that the particular site is absolutely necessary for appellant's responsibility under appellant's Certificate. (Transcript, p. 35, lines 2-6.)

Under the provisions of § 78-34-4, Utah Code Ann. (1953), appellant meets the requirements therein:

Before property can be taken it must appear:

(1) That the use to which it is to be applied is a use authorized by law;

(2) That the taking is necessary to such use; and

(3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

The uses for which the right of eminent domain may be exercised are listed in § 78-34-1, Utah Code Ann. (1953), and include:

(8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

The trial court herein determined from the evidence that the telephone service provided by appellant is within the meaning of "telephone" as defined in Title 54, Chapter 2, Utah Code Ann. (1953), and that the appellant has the power of eminent domain under Title 78, Chapter 34, Utah Code Ann. (1953). (Record, p. 57.)

The use to which the property herein is to be applied is a use which has been authorized by the Utah Public Service Commission after consideration of public need, pursuant to the previously cited states. The taking of a base station site in

furtherance of the communications services provided by appellant is necessary to meet such public need. In a proper case, the Courts may consider whether the particular taking is necessary as in Salt Lake County v. Ramoselli, ---P.2d--- (Utah, 1977).

In the instant case, however, the Utah Public Service Commission has previously determined the particular public need in Logan, and appellant has taken all the steps and made the necessary decision to put the service into operation as authorized.

The general rule regarding selection of the property to be taken is stated in 29A C.J.S. Eminent Domain §90 as follows:

> The particular property sought to be condemned by the grantee of the power of eminent domain must be necessary for the proposed project, but its decision as to the necessity will not be disturbed by the courts, at least in the absence of fraud, bad faith, or abuse of discretion.

Accord, Bountiful v. Swift, 535 P.2d 1236 (Utah, 1975) (cited in §90).

The rule is also stated in 1 Nichols on Eminent Domain, § 4.11 as follows:

> The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.
>
> . . .
>
> . . . In accordance with the general principle, it has been held that the courts may not inquire into the question
>
> (1) whether there is any necessity for the taking,
>
> (2) whether there is any need for resorting to eminent domain in effecting such acquisitions,
>
> (3) whether the time is a fitting one,
>
> (4) whether there is a need for the property to the extent sought to be acquired, . . .
>
> (5) whether there is any need for the particular estate sought to be condemned, . . .
>
> . . .

The Utah case of Postal Tel. Cable Co. v. Oregon S.L.R. Co., 23 Utah 474, 484 (1901) states:

> . . . It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interferred with. With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. (Citations omitted.)

The trial court erred in finding (Record, p. 130, Findings of Fact No. 7) that there were several other

alternative sites that would perform the service offered by appellant. The clear evidence presented by appellant was there it was economically unfeasible to provide service in the Logan area from more than one base site, and that to locate several transmitters in the area to effect the same coverage and penetration as the one site could give would make the cost of such service prohibitive.

> A. Well, the primary consideration, of course, is cost to the public. We cannot feasibly develop a site so expensive that the public themselves cannot afford to use the paging service or the mobile or portable [telephone] service we have to offer. (Transcript, p. 22, lines 2-6, testimony of plaintiff.)
>
> . . .
>
> Q. If that site were not available, Mr. Williams, what alternative would there be, if any?
>
> A. Well, the site became unavailable to us, I think the first thing we'd have to do is reappraise whether reliable paging service could be given to the people of Logan.
>
> Q. And if that were possible how would that be done?
>
> A. Well, the first thing --
>
> Q. Barring economic considerations.
>
> A. Well, technically what we'd have to do is probably install a number of transmitters, one I'd say to cover the city, another to cover portions of the surrounding area, and possibly as many as three transmitters would be necessary. But the problem with this is the fact

that with more transmitters and more repeater sites and more control equipment for that increases the price to the customer. I would estimate it would cost between two and three times the amount of money that we are presently offering or would offer the service for. (Transcript, pp. 40-41, Questions by Mr. Lloyd, Answers by plaintiff.)

. . .

Q. Do you know of any alternate sites that would be economically feasible for your company to put in in the Logan area?

A. No, I do not.
(Transcript, p. 99, lines 13-16, Questions by Mr. Lloyd, Answers by Byron Colton, manager for appellant.)

. . .

Q. Well, then why do you claim that this is the only acceptable site?

A. That location right there is the only one that does an adequate job of serving the community.

(Transcript, p. 146, lines 1-4, Questions by Mr. Harris , Answers by Charles L. Johnson, appellant's chief engineer.)

The appellant having established the need for the site, it was error for the trial court to admit speculation by witnesses that there could be satisfactory alternative single sites, or for the court to find that ecomonically there could be satisfactory alternative multiple sites. Not one witness produced by defendant or intervenor had any experience in the equipment or operation of a radio common carrier system presently

operated by appellant at numerous locations in Utah. Not one witness produced by defendant or intervenor had performed any kind of objective test using the type and caliber of equipment appellant operates in Utah. There was no evidence that appellant's system ever caused or is causing any actual radio-wave interference in the operation of extensive transmitting equipment base stations throughout the most populous areas of Utah.

POINT II. INTERVENOR HAS NO STANDING TO CONTEST THE COMPLAINT OF APPELLANT.

The trial court erroneously permitted intervenor to enter this action. Utah Code Ann. § 78-34-7 (1953) provides:

> All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint.

Intervenor North Utah Community TV has no interest or estate in the property described in the complaint. It does have a large antenna approximately 100 feet from the property sought for condemnation, and owns real property some 400 feet to the west and 200 feet to the north of the site. (Defendant's Ex. 1;

Transcript, p. 306, lines 15-23.)

This Court has refused to allow owners of adjoining property to intervene in condemnation actions without showing that the intervenor had a vested interest in the property being condemned. In State v. Tedesco, 4 U.2d 31, 286 P.2d 785 (1955), an owner of adjoining property filed a claim that his land would suffer damages if the land in question were condemned. This Court stated that the intervenor could prevail only if the facts clearly established that it had a "present, direct and real interest" in the land sought to be condemned by the state. In Tedesco both land owners planned to develop subdivisions and had agreed that there would be restrictive covenants on the land.

Similarly, other jurisdictions have disallowed claims of adjoining property owners for intangible harm alleged to be caused by the establishment of the public use. 29A C.J.S. Eminent Domain § 163. For example, in City of Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971), the Kentucky Court of Appeals held that automobile noise and the mere presence of a municipal zoo next door was insufficient to establish any claim for damages, in the absence of showing

material interference with the ordinary physical comfort or reasonable use of the complaining neighbor's property. That court further stated that it was not aware of any case in which recovery was allowed where the alleged taking, injury or interference did not have physical aspects.

POINT III. DEFENDANT HAS NO STANDING TO CONTEST CONDEMNATION ON BEHALF OF POSSIBLE FUTURE RESIDENTIAL NEIGHBORS.

The trial court erroneously found that the use of the particular site by appellant raises the likelihood that its installation would seriously interfere with television sets within the proposed subdivision within a distance of one-half mile. Defendant urged the trial court to deny the appellant's right to use the property herein on the grounds that it may interfere in future lot sales on the remainder of defendant's property.

The clear testimony was that appellant operates within high density residential locations in other Utah locations without any interference of any kind. No complaint has ever been lodged against appellant with the governing authorities, the Utah Public Service Commission or the Federal Communications Commission.

Transcript, pp. 19, lines 20-25; 20, lines 1-5, 19-23; 59, lines 14-25; 60, lines 1-7; 71, lines 22-23; 73, lines 7-9; 205.) All testimony introduced on this question of future residential interference by defendant was speculation on the part of experts in general radio experience who had no experience with any of appellant's equipment. (Transcript, pp. 231-232; 285-286.)

The trial court's finding regarding future possible interference ignored defendant's own witnesses who described commercial radio broadcasting antennas within the City of Logan broadcasting daily within the residential areas at thousands of watts of effective radiated power, whereas appellant is limited to 500 watts, effective radiated power. (Transcript, p. 269, lines 22-25; 274, lines 10-23.)

POINT III. APPROVAL OF SITE LOCATIONS AND QUESTIONS OF INTERFERENCE BETWEEN COMMON CARRIERS AND OTHER REGULATED RADIO CARRIERS IS SOLELY WITHIN THE PROVINCE OF THE F.C.C.

The trial court denied appellant's right to condemn the particular site herein solely on the possibility of future radio wave interference with intervenor's system and televisions in future residential areas near the site herein, finding that there were alternative sites which would not

run any risk of interference with other public use facilities. (Findings of Fact 9, 10, Record p. 130.)

This determination of the trial court was outside of its authority, as the question of radio wave use and interference is entirely pre-empted by federal law. The fundamental rationale for the Federal Communications Act of 1934, 47 U.S.C. §§ 151, et seq., is based on the fact that the number of available radio frequencies is finite, and therefore, Congress must exercise its power over interstate commerce to allocate available frequencies and control their use. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940). Unquestionably, federal legislation has pre-empted local regulation of radio transmission, including assignment of frequencies, interference phenomena, and the content of broadcast material. Allen B. Dumont Laboratories Inc. v. Carroll, 86 F. Supp. 813, aff'd, 184 F.2d 153, cert. denied, 340 U.S. 929; United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Cited in Schroeder v. Municipal Ct of Los Cerritos, 141 Cal. Rptr. 85, 87 (Cal. App. 1977).

It is stated in Schroeder, supra, at 88:

> By contrast, many detailed regulations govern the assignment of frequencies and the prevention

> of interference phenomena (see e.g., 47 C.F.R. §§ 97.73, 97.131, 97.133), and there can be no doubt that federal regulation has pre-empted control in those areas.

The power of the Federal Communications Commission (FCC) over radio common carriers, including appellant, and over cable television systems, including intervenor, is plenary insofar as assignment of frequencies and interference questions is concerned. Such power includes approval or disapproval of base station site locations. Appellant may not construct the site here in question without FCC approval in the form of a construction permit. Included in the FCC's determination is whether there are frequency or interference questions between appellant and other broadcasters or users, including intervenor. Such power over appellant is stated in American Tel. & Tel., Co. v. F.C.C., 572 F.2d 17, 25 (2d Cir. 1978):

> The FCC has a duty to "execute and enforce the provisions of" the Communications Act, 47 U.S.C. § 151. The Communications Act requires that common carriers furnish service on reasonable request, 47 U.S.C. § 201(a); that rates and practices be just, fair, reasonable and nondiscriminatory, 47 U.S.C. §§ 201(b), 202(a); that carriers file their tariffs with the FCC, 47 U.S.C. § 203(a); that the FCC investigate complaints, 47 U.S.C. § 208; that carriers obtain certificates of public convenience and necessity before constructing, acquiring or operating any facilities or terminating any services, 47 U.S.C. § 214; that the FCC examine transactions that might affect rates or services, 47 U.S.C. § 215; and that carriers submit

> applications for proposed consolidations and mergers to the FCC, 47 U.S.C. § 222. We are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met.

Both appellant and intervenor are closely regulated by the regulations adopted by the FCC. Intervenor's technical operation is governed by parts 76 and 78, 47 C.F.R., for cable television, CATV operations. Detailed technical regulations concerning CATV amplification and interference are located at 47 C.F.R. §§ 76.601 et seq. (1977). Appellant is likewise subject to strict regulation as regards improper tuning and quality of equipment to prevent any interference with existing or projected commercial or residential receivers, as provided in 47 C.F.R. §§ 21.500 et seq. (1977).

There were sharp differences in the testimony adduced at the trial in this matter regarding whether there would be any interference generated from appellant's site. Appellant objected to the speculative testimony of intervenor and defendant's witnesses as to possible interference concerns, particularly where such witnesses had no experience in radio common carrier equipment or operations. It is appellant's position that, absent some showing of interference from

the numerous base station sites in Utah in operation for many years throughout the major metropolitan areas in Utah and closer in proximity to many commercial receivers similar to the cable television receiver operated by intervenor, that the issue of interference is reserved solely to the FCC which has the expertise to make such determinations, and which, by law, has primary jurisdiction over such questions of location of transmitting equipment, the specifications of such equipment, and the assignment of operating frequencies.

The inappropriateness of the trial court's attempting to evaluate the technical testimony reserved by law to the FCC is illustrated in the court's comments during the course of the trial:

> I have no expertise at all in this field, and I have to depend on what you people are telling me about it. (Tr. p. 254, lines 1-2.)
>
> . . .
>
> I do want to review the notes that I've taken because I do have certainly some consternation, as one of the counsel put it, in connection with the facts that have been put before this court, and I certainly think in a field like this that the only thing I know about communications, I either turn on a knob or lift up a receiver, and that's about it. So it does certainly cause me some problems in analyzing it, and I'll give my attention to it and get it to you as soon as I can. (Tr. p. 372, lines 15-24.)

The testimony from intervenor was contradicted as to whether there was a real question of any interference. When appellant first located the site in question, he met with the President of defendant, the owner of the property, to discuss purchasing the property for the use indicated herein. Mr. Gibbons indicated he would sell the property if the Community TV people had no objection. The CATV engineer, Kent Gardner, then came to the site with appellant, appellant's manager, and Mr. Gibbons. After describing the proposed use, antenna and frequencies, Mr. Gardner stated he could see no objection to the use of the site. (Tr. Pp. 35, lines 7-25; 36-39; 40, lines 1-6; 98, lines 12-25; 99, lines 1-12.) Mr. Gardner testified for intervenor on other matters, but did not deny the prior admission. (Tr. 308-314.)

The Court permitted an opinion by Boyd Humphries, a witness for intervenor who had no experience with appellant's proposed equipment, as to the probability of interference from appellant's base station transmissions to the Channel 6 of the CATV system, which he estimated to be 8 to 10 on a scale of 10, with 10 being the highest probability, over appellant's objection. (Tr. p. 320, lines 4-25, p. 321, lines 1-5.) When pressed on cross examination,

as to how far a theoretical interfering signal would be able to travel from appellant's transmitter, Mr. Humphries could not answer what signal strength a theoretical interfering signal would have based upon the specifications of the proposed equipment because he did not know what the quality of the antenna would be, and he admitted that it was common practice to solve such a theoretical problem with inexpensive filters. (Tr. p. 325, lines 6-25; 326; and 327, lines 1-14.)

In contradiction of intervenor's speculative testimony, appellant's engineers described other broadcasting sites in Utah, using identical equipment with that proposed for Logan, transmitting continuously within several feet of receivers having the same receiving function as the CATV antenna in Logan, with no interference. (Tr. pp. 18, lines 12-25; 19; 97, lines 18-25; 98, lines 1-11; 67, lines 8-25; 68, 1-11.) In addition, appellant's electronics engineers continuously monitor transmission equipment for spurious or harmonic emissions. None have occurred. (Tr. pp. 204, lines 6-19, 23-25; 205, lines 8-25; 206.) Further, if, after tests are run with the actual equipment, an unexpected interference problem arises on a frequency, uncorrected by adjustments, an

alternative frequency could be obtained from the FCC. (Tr. p. 328.)

Appellant testified extensively concerning the tools available to insure that the transmitting equipment does not disturb any other equipment in the area, including shielding the antenna, filtering the equipment, and carefully analysing the signals generated as the system is placed into operation for spurious emissions or harmonic distortions which are not supposed to be present with the caliber of equipment used by appellant. Both witnesses for intervenor and defendant admitted that such techniques are available and common. (Tr. pp. 328; 338, lines 6-11. Tr. pp. 340, lines 15-25; 341-345.)

The recitation of the conflicts in the testimony and the degree of technical evidence admitted by the court demonstrates the wisdom of Congress investing in the FCC, as a technical administrative agency, the exclusive jurisdiction over interference and frequency assignment. Federal control over technical matters such as frequency allocation to radio stations is exclusive. Head v. New Mexico Bd of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963).

The technical determinations that are made by the FCC are illustrated in the complicated regulations promulgated by that agency, and the technical decisions published in the FCC Reports, now in its second series. An example of the question of frequency assignment and the multiple use of the frequency bands in harmony discussed in the testimony in the trial court over appellant's objections, is contained in a lengthy technical order, In Re Frequency Bands Land Mobile Service, 51 F.C.C.2d 945 (1975), and cited in National Assoc. of Regulatory Utility Comm. v. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert. den., 425 U.S. 992 (1976). In National Assoc. the Court of Appeals for the D.C. Circuit, held that the determinations as to the extent of the allocation of frequency spectrum to the development of a nationwide, broadband cellular mobile radio communications system are the sort that Congress intended to leave to the broad discretion of the FCC by imposing a broad public convenience, interest, or necessity standard.

The trial court stepped beyond its authority in substituting its judgment as to the alternatives and necessities available to appellant, as that decision is exclusively the domain of the FCC or the Utah Public

Service Commission. The use is clearly a public use. The necessity of the use has already been determined by the Utah Public Service Commission. The necessity of the particular site has been determined by appellant through a process of careful analysis and study. Appellant has not acted in bad faith or in an oppressive manner. Appellant is not taking anything from intervenor directly, as intervenor has no ownership in the property in question. Intervenor has submitted itself to the jursidiction of the FCC and operates under an FCC permit and license at the Logan site. It is the FCC which must determine whether there is any merit to intervenor's contentions regarding interference. Such a determination cannot be made until appellant secures a site which is suitable in his opinion for the purposes of his Certificate.

The ruling of the trial court denying the appellant this particular site should be reversed and the case remanded with directions to proceed with the unresolved issues of temporary use and value. The need in Logan exists for the service of the appellant and, in some cases, is a matter of life itself where physicians require such communications services.

Dated this 11th day of December, 1978.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies each of the within Brief of Appellant to Mr. B. H. Harris, attorney for Defendant-Respondent, Harris, Preston & Gutke, 31 Federal Avenue, Logan, Utah 84321, and Mr. L. Brent Hoggan, attorney for Invervenor-Respondent, Olson, Hoggan & Sorenson, 56 West Center Street, Logan, Utah 84321, postage prepaid, this 11th day of December, 1978.

David Lloyd